NOS. 82-662 and 82-703

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF MILLTOWN,
Petitioner,

and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,
Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER BOROUGH OF MILLTOWN IN OPPOSITION TO THE BRIEFS OF RESPONDENTS

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REPLY BRIEF OF PETITIONER BOROUGH OF MILLTOWN IN OPPOSITION TO THE BRIEFS OF RESPONDENTS

In general, the petitions for certiorari filed by the Borough of Milltown ("Milltown") and the Middlesex County Utilities Authority ("MCUA"), and the briefs in

opposition submitted by the City of New Brunswick ("New Brunswick") and by the Solicitor General on behalf of the Environmental Protection Agency ("EPA"), tightly draw the significant issues presented by this case. A short reply is necessary, however.

1. This case arises from the District Court's partial grant and partial denial of cross-motions for summary judgment. Facts were not developed and state court issues were remanded. This may explain some distortion in the opposition briefs. For example, EPA's statement that Milltown "pays nothing at all" (page 10)is true only to the extent that Milltown pays nothing to MCUA with which it has no contract. In fact, there has been and is substantial consideration for New Brunswick's contractual obligation to "take charge and dispose of" Milltown's sewage and, on top of that consideration, Milltown expends substantial funds to collect and pump its sewage to New Brunswick. Nor is EPA correct in saying (page 2, n. 2) that there is no time limitation to the contract. That the agreement is limited, rather than perpetual, was exactly what was adjudicated in *New Brunswick* v. *Milltown*, 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949). Nor, finally, can we agree with New Brunswick's claim that "it is not disputed that Milltown is located in the MCUA district area" (page 3, n. 2). Many other Middlesex County municipalities neither contracted with MCUA for sewage disposal nor adopted a resolution pursuant to N.J.S.A. 40:14A-4(g). When MCUA was established in 1950, Milltown had just had its contract with New Brunswick sustained, *New Brunswick* v. *Milltown, supra,* and could rely upon the non-impairment language of N.J.S.A. 40:14A-36 and 40:14B-68. This Court should not get bogged down in local legal questions and factual details that are not presented and need not be considered.

2. EPA asserts that agency deference does not depend upon technical isues and technical expertise (page 8, n. 6). But saying so does not make it so. Expertise has always been the major ground for deference, and EPA gives no reason for its assertion to the contrary. Indeed, EPA twice cites (pages 8 and 11) *Chrysler Corp.* v. *EPA*, 631 F. 2d 865 (D.C. Cir.), *cert. den.*, 449 U.S. 1021 (1980), which involved an extremely technical record, 631 F.2d at 869-878, and deference to the agency's "special expertise". *Id.* at 884. Milltown submits that none of the precedents relied upon by EPA (pages 8 and 11) and by New Brunswick (pages 5-6) are apposite because none involve the circumstances here: a question of *legal* competence, not *technical* expertise, and an issue of the agency's own statutory jurisdiction. The matter of agency deference should be considered and resolved once and for all. See page 22, ¶5 of Milltown's petition.

3. Finally, there is EPA's submission that the contract impairment issue is "wholly without merit" (page 12) and the *Pennhurst* point is "specious" (page 11, n. 8) because EPA has not harmed the Borough of Milltown: because EPA's statutory construction "in no way abrogates Milltown's contract" (page 12—paraphrasing the court below), and because "the [EPA's] grant condition does not require [Milltown] to do anything" (page 11, n. 8).

Words replace reality in the no-harm assumption EPA would foist upon this Court. As a December 27, 1982, EPA document (a joint exhibit in the remanded state court trial of this matter) makes clear, EPA is using MCUA as its pawn. The document (from EPA regional headquarters to its national office)* recommends release of grant funds to MCUA if, *e.g.*, MCUA submits "written

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* Appended to this brief.

evidence that the Borough of Milltown case is still being vigorously prosecuted." And the result of this coercive tactic is equally clear. Here is what MCUA wrote in a supplemental trial brief in the state court action (filed January 3, 1983) (p. 8):

> "What MCUA can do, and is doing, in this case is to seek to alter the legal relations between the parties [Milltown and New Brunswick]. It is attempting to establish a legal basis to compel Milltown to adopt an EPA approved sewer user charge ordinance and to impose sewer use charges."

The reality is raw: EPA was judicially denied the right to impose its user charge regulations on Milltown. (EPA brief at page 6, n. 5). Instead of appealing, EPA pressured MCUA to seek abrogation of the Milltown contract and imposition of the user charge system. MCUA, more interested in its grant than in its own enabling legislation,* has been performing the role created for it by EPA. In short, EPA's statutory construction does impair and is being used to abrogate the Milltown/New Brunswick contract; and the grant condition is likewise being used to require Milltown to do something it is not legally obligated to do. This Court should deal with fact, not legal fiction, and remedy EPA's overreaching here.

Respectfully submitted,

CLAPP & EISENBERG,
A Professional Corporation,
Attorneys for Petitioner
Borough of Milltown,
By: ARNOLD K. MYTELKA,
Attorney of Record.

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*The enabling legislation precludes impairment of pre-existing intermunicipal contracts. N.J.S.A. 40:14A-36; 40:14B-68.

SUPPLEMENTAL APPENDIX

U.S. ENVIRONMENTAL PROTECTION AGENCY
Region II
26 Federal Plaza
New York, New York 10278

December 27, 1982

Request for a Deviation From 40 CFR 35.935-13(a)
for the Middlesex County Utilities Authority

Jacqueline E. Schafer /s/ JACQUELINE E. SCHAFER
Regional Administrator (2RA)

Harvey G. Pippen, Director
Grants Adminstration Division (PM-216)

This is in response to the memorandum of November 23, 1982 from James R. Murphy to William J. Muszynski (copy attached), concerning implementation of a user charge system in Sayreville, New Jersey. This memorandum is the formal deviation request from the above-referenced regulations on behalf of the Grantee, Middlesex County Utilities Authority (MCUA).

The MCUA has submitted an acceptable user charge system and has submitted acceptable systems for all 26 members with the exception of the Borough of Milltown and the Borough of Sayreville.

The Borough of Milltown utilizes the system of the City of New Brunswick, a member of the MCUA. The City of New Brunswick has submitted an acceptable user charge

system and has initiated legal action against the Borough of Milltown to have the court order the Borough to adopt an acceptable user charge system. The City has agreed to vigorously prosecute its pending lawsuit against Milltown and has committed itself to undertake all other possible actions that may be necessary to ensure that Milltown complies with this Agency's user charge requirements. The MCUA has filed a cross claim in that suit against Milltown in which it joined in New Brunswick's request.

The MCUA has instituted court action to compel the Borough of Sayreville to also comply with EPA's user charge requirement. The Murphy memorandum has indicated that neither the existing tax structure in Sayreville nor the ad valorem system proposed for the Borough by the MCUA are approvable. The MCUA has indicated that it would use this decision to seek enforcement of a state court order it has secured against the Borough of Sayreville which requires Sayreville to adopt an approvable system. The state court order does not require Sayreville to enforce the adopted ordinance until the resolution of the state court appeal.

Under these circumstances, it seems an extremely harsh penalty to continue wthholding grant funds from MCUA to the extent of approximately $10 million when it is prosecuting the cases against the two hold-out municipalities. The penalties are large because MCUA has been forced to borrow at high interest rates the amounts withheld in order to meet its commitments. The costs are, of course, passed on to the municipalities that are in compliance through increased service charges and are in turn billed to the local users and are not eligible for Federal funding.

Supplemental Appendix

Recommendation:

Based on the above-information, I am requesting a favorable decision on the deviation request to allow the MCUA to receive payment beyond the 82% current restriction for user charge compliance and up to the 95% level. The MCUA has demonstrated that they have taken legal means to force the communities, in question, to comply with this Agency's user charge requirements. Therefore, it would be unfair to further restrict grant monies from the MCUA since they have complied with our requirements as far as they are able. However, as required in the Murphy memorandum, the following schedule for payment will be utilized:

1. Release up to 90% upon receipt of a favorable response on this deviation request. This is based upon the MCUA's demonstration of meaningful progress towards resolution of the user charge non-compliance from early 1980 when the Region first withheld payment and the assumption that MCUA will immediately seek to compel Sayreville to comply with the state court order which requires Sayreville, immediately, to adopt (but not enforce) an acceptable ordinance. A summary of the progress is attached.

2. Release up to 92% pending receipt of an acceptable draft user charge system from the Borough of Sayreville. In addition, written evidence that the Borough of Milltown case is still being vigorously prosecuted.

3. Release up to 95% upon final approval of the user charge system for the Borough of Sayreville. This final approval will only be given when Sayreville ac-

tually begins to enforce an acceptable, adopted system. Also, continued evidence that the Borough of Milltown case is being pursued through all legal means.

Your concurrence with this request would be appreciated. Should you have any further questions, please contact Mr. Douglas Herbst of my staff at 8-264-5670.

Attachments

Supplemental Appendix

SUMMARY OF MCUA's ACTIONS TOWARDS USER CHARGE COMPLIANCE

Milltown

In August 1980, New Brunswick instituted an action in the Superior Court of New Jersey against both MCUA and Milltown. It sought an order declaring the 1914 contract between New Brunswick and Milltown, giving Milltown a free ride on the disposal of its sewage, void and unenforceable because of EPA's intervening regulations requiring the adoption of an acceptable UCS and SUO by each municipality whose sewage was treated by a regional system.

MCUA, claiming that it had no authority to abrogate the 1914 contract or to impose a UCS or SUO against Milltown impleaded EPA as a third-party defendant.

EPA removed the action to the Federal District Court for the District of New Jersey and moved for summary judgment which was granted on September 9, 1981. The court held that EPA's regulations were valid and that its withholding of grant funds from MCUA because of Milltown's refusal to adopt acceptable sewer charges was not an unconstitutional abrogation of the 1914 contract. It remanded the case to the New Jersey Superior Court to decide whether Milltown should be ordered to adopt acceptable user charges.

Milltown appealed the District Court order to the Federal Third Circuit Court of Appeals which affirmed the judgment of the lower court in a decision dated July 22, 1982. Milltown has applied for a writ of certiorori to the United States Supreme Court.

Supplemental Appendix

On the remand to the Superior Court of the issue concerning the 1914 contract, MCUA has aligned itself with New Brunswick in an effort to void that contract and to impose on Milltown the requirement that it adopt acceptable user charges. A trial is presently scheduled for January, 1983. If Milltown loses, it probably will appeal to the Appellate Division and will try to take any loss there to the New Jersey Supreme Court.

Sayreville

On February 1, 1981, MCUA instituted an action in the New Jersey Superior Court seeking to compel Sayreville to adopt a UCS and a SUO. Sayreville impleaded EPA as a third-party defendant which had the action removed to the Federal District Court for the District of New Jersey. EPA moved for summary judgment which was granted on December 1, 1981, the court holding that EPA's regulations requiring municipalities subscribing to regional systems to enact acceptable user charges was valid.

The court declined to rule on MCUA's motion to compel Sayreville to comply with EPA's regulations and remanded that issue to the New Jersey Superior Court for determination.

Sayreville appealed to the Federal Third Circuit Court of Apeels the order against it in favor of EPA. The appeal was denied.

Meanwhile, on remand of the MCUA—Sayreville issued [sic] to the New Jersey Superior Court, MCUA moved for summary judgment requiring Sayreville to adopt a UCS and SUO. On February 3, 1982 the court granted MCUA's motion and directed Sayreville to enact a UCS and a SUO

by April 7, 1982. On that date, Sayreville did introduce an ordinance on first reading for the imposition of user charges. A public hearing was held on April 21, 1982 at the conclusion of which the proposed ordinance was tabled.

Prior to the public hearing Sayreville appealed the February 3, 1982 Superior Court order against it to the New Jersey Appellate Division on March 16, 1982. Briefs have been filed by both parties but the court has not yet scheduled a time for oral argument. The MCUA has requested that the appeal be heard on an expedited basis. Meanwhile, the Apellate Division has refused to stay the trial court order requiring Sayreville to adopt an acceptable ordinance although it did stay that portion of the order requiring Sayreville to enforce the ordinance pending appeal. The MCUA has indicated that it will immediately seek to compel Sayreville to comply with the court order, i.e., to adopt an acceptable ordinance. Whoever loses in the Appellate Division will undoubtedly appeal to the New Jersey Supreme Court.

Supplemental Appendix

Middlesex County Utilities Authority
Project Number C-34-637-01

Grant Amount	$ 78,844,421
Total Eligible Amount	$105,125,895

According to the October 15, 1982 letter from grantee's consulting engineer to grantee's counsel, the following cost data was supplied:

Paid to date	$65,314,910
%	82.8%
Value of grant eligible work as of August 26, 1982	$104,369,656
Final eligible project costs are expected to be	$106-107 million

Given the above-information, it is evidence that by releasing further payments to MCUA to the 92-95% range, the Region will have the remaining monies available to use as withholding pending compliance. This is borne out by the fact that the final total eligible project costs will be more than the existing amount contained in the grant. The grant would require a future increase to account for these increased eligible costs.

Therefore, the Region need not be concerned that by releasing further payments, the MCUA would in effect receive more than 92-95% of their final grant entitlement. This would be the case if the final total eligible project costs would be less than the existing amount contained in the grant.

Supplemental Appendix

[SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

November 23, 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT:

Middlesex County Utilities Authority—Borough of Sayreville User Charges

FROM:

James R. Murphy, Acting Director /s/ DAVID LUOMA
Municipal Construction Division (WH-547)

To:

William J. Muszynski, Acting Director
Water Management Division, Region II

This is in response to your memorandum of September 22, 1982, to Henry Longest, concerning implementation of a user charge system in Sayreville, New Jersey. This response confirms the discussion that Dave Luoma held with you on November 12, 1982, in which the following points were made.

First, it is the opinion of the Office of General Counsel (OGC) that neither the existing tax structure in Sayreville nor the ad valorem system proposed for the Borough

by the Middlesex County Utilities Authority (MCUA) are approvable. This opinion, dated November 5, 1982, (copy attached) has a statutory basis and we concur with it.

Next, we would encourage you to continue to work with the grantee, MCUA, toward meeting its grant condition of having actual user charge systems implemented in Sayreville and in another serviced community of Milltown. You should do this as far as is prudent and reasonable, while adequately protecting the Federal interest. At your option, we would support a plan for incremental release of further grant payments in return for the grantee clearly demonstrating meaningful progress toward resolving the Sayreville and Milltown user charge problems. If you intend to proceed with such a plan, we would further recommend that a cap of 90%-95% of the grant amount be established until all MCUA—related user charge systems are approved and adopted.

You are, of course, aware of the need for a request for a deviation from user charge regulations if you decide to release further grant payments before all user charge systems are approved and adopted. Therefore, we would also recommend that such a request include a discussion of the terms under which incremental payments would be released and an indication of the level of the cap on grant payments.

Attachment

cc: Sol Seid